

Managing superannuation costs for foreign nationals working in Australia

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In brief

Due to a number of legislative changes, the cost of providing superannuation for foreign nationals working in Australia has increased over the last 12 months. In this insight, we explore the reason for this increase, and how these costs can be managed.

It is common practice for organisations that have foreign nationals working in Australia to continue to contribute to the employee's home pension or social security scheme whilst they are working temporarily in Australia.

To manage the overall cost of the assignment, organisations utilise a number of different strategies to reduce the impact of superannuation costs, such as relying upon a certificate of coverage under a Bilateral Social Security Agreement or the senior executive superannuation exemption. Where an exemption is not available, organisations may have sought to recoup from the employee the double benefit of home country entitlements and the employee's entitlement to a Departing Australia Superannuation Payment (DASP) upon departure from Australia.

In detail

The repeal of the Subclass 457 visa from 18 March 2018 and changes to the *Fair Work Act* effective 15 September 2017, mean that organisations need to consider their ability to continue to utilise these methods of managing superannuation costs for foreign nationals working in Australia.

Senior Executive Exemption

Superannuation legislation and regulations allow a 'prescribed employee' to be exempt from Australia's Superannuation Guarantee. A 'prescribed employee' is defined as including an employee holding a subclass 456, 457, 956 or 977 visa where (among other requirements) they hold a position as a senior executive of a company, or an employee who is establishing a business activity in Australia, and the employee's position carries substantial executive responsibility.

In March 2018, the Australian Federal Government replaced the Subclass 457 Temporary Work (Skilled) Visa with the Subclass 482 Temporary Skills Shortage (TSS) Visa.

The existing regulations which contain the senior executive exemption from the Superannuation Guarantee, are expected to be amended in the coming weeks. Specifically, the Treasury released draft

Superannuation Guarantee (Administration) Regulations 2018 which include references to both the new Subclass 482 visa and the Subclass 400 visa Temporary Work (Short Stay Specialist).

The draft Regulations state that the new Regulations will commence the date after registration on the Federal Register of Legislation. Clarification is now being sought as to whether these changes will be applied retrospectively since the new visas came into operation.

For further information, refer to our previous [Global Mobility Insight](#).

DASP and Fair Work changes

Where an exemption from superannuation does not apply, and the employee continues to receive contributions to their home pension/social security scheme whilst on assignment in Australia, the employee may be receiving a 'double benefit'. Organisations may have policies and processes in place to claim back the double benefit from the inbound assignee.

The recoupment of the double benefit may have occurred once the employee had permanently departed Australia and was at that point able to withdraw their superannuation as a DASP. In some cases, organisations may have also requested that the employee repay the double benefit to the company upon obtaining Permanent Residency in Australia, or upon cessation of employment where the person did not depart Australia. In these cases, the employee would not have been eligible to apply for a DASP and the employee may have been required to pay an equivalent amount as cash.

On 15 September 2017, the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* took effect. This Act amended section 325 which prohibits an employer from requiring an employee to unreasonably pay monies to the employer (or a third party connected to the employer). The Fair Work Act does not stipulate what might be "reasonable" in all circumstances.

As a result of the Fair Work changes, consideration needs to be given as to whether recouping this 'double benefit' is 'reasonable' for the purposes of section 325. This should take into account whether there is a true 'double benefit' factoring in the value of the benefit received in the home country and Australia. Asking an employee to repay an equivalent amount in cash where they are not eligible to a DASP may not be reasonable.

The takeaway

Due to the recent changes to the Fair Work Act and the replacement of the Subclass 457 visa, previously acceptable superannuation cost management strategies may no longer be available and recoupment of superannuation or equivalent amounts may be considered to be in breach of the Fair Work Act.

Accordingly, organisations should be reviewing their policies and procedures in light of these changes to make sure they are compliant with current legislation. A watching brief should be maintained to see when the changes to the superannuation regulations will be made to include the TSS visa. It is also recommended that employment law advice be obtained in respect of alternative approaches that may be implemented to prevent unintended 'double benefits'.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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